Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON TOXICS COALITION, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants, and CROPLIFE AMERICA, Applicant for Intervention.	No. 2:04-cv-01998-JCC UNOPPOSED MOTION OF CROPLIFE AMERICA TO INTERVENE AS PARTY DEFENDANT, AND MEMORANDUM IN SUPPORT Note on Motion Calendar: Friday, December 3, 2004

CropLife America ("CLA") hereby moves to intervene in this action as party defendant pursuant to Rules 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure. A Proposed Order is attached, as is a Proposed Answer pursuant to Rule 24(c).

Counsel for CLA has conferred with counsel for the other parties to determine whether there is opposition to this motion. Defendants' counsel (Mr. Maysonett) advises that his clients take no position on CLA's intervention. Plaintiffs' counsel (Ms. Goldman) advises that Plaintiffs

LEARY · FRANKE · DROPPERT PLLC
1500 Fourth Avenue, Suite 600
Seattle, WA 98101
t: 206.343.8835
f: 206.343.8895

do not oppose CLA's intervention consistent with Ninth Circuit precedent (described in the next paragraph), provided CLA does not inject new issues or claims.

Ninth Circuit precedent allows a private party to intervene permissively in defense of a claim under the National Environmental Policy Act ("NEPA"), but limits intervention as of right to the remedy phase of such a claim. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108-09 (9th Cir. 2002) (granting permissive intervention in NEPA case). Therefore, CLA moves to intervene permissively in all aspects of this case; and to intervene as of right in all aspects of this case except the merits phase of Plaintiffs' NEPA claim (Count VII).[1]

As explained below, CLA is entitled to intervene as of right under Rule 24(a)(2) because it has significant interests relating to the rulemaking action which is the subject of this suit, and because that interest is not adequately represented by any existing party. Alternatively, CLA should be granted permissive intervention under Rule 24(b)(2) because its "claim or defense and the main action have a question of law or fact in common."

INTRODUCTION

In this suit, Plaintiffs Washington Toxics Coalition, et al., challenge joint counterpart regulations issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service ("Services") pertaining to consultation under § 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, for regulatory actions under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). *See* 69 Fed. Reg. 47732 (Aug. 5, 2004). Jurisdiction is grounded in the Administrative Procedure Act ("APA"). *See* Complaint ¶ 15.

ESA § 7(a)(2) provides that each federal agency (the "action agency") shall, "in consultation with and with the assistance of the Secretary," insure that any action it authorizes, funds, or carries out, "is not likely to jeopardize the continued existence of an endangered species

[1] If permissive intervention is not granted on the merits of Count VII, CLA seeks *amicus curiae* status on that aspect of that claim.

LEARY · FRANKE · DROPPERT PLLC
1500 Fourth Avenue, Suite 600
Seattle, WA 98101
t: 206.343.8835
f: 206.343.8895

or threatened species or result in the destruction or adverse modification of" the critical habitat of any such species. 16 U.S.C. § 1536(a)(2). In 1986, the Services issued general procedural regulations on § 7(a)(2) consultations between the Services and federal action agencies. *See* 51 Fed. Reg. 19926-63 (June 3, 1986) (promulgating 50 C.F.R. Part 402, Subparts A and B). Those general regulations can be superseded by "counterpart" regulations better tailored to a specific agency program. *See* 50 C.F.R. § 402.04.

The Services promulgated the regulations at issue in this case pursuant to § 402.04 to provide alternative procedures for insuring ESA § 7(a)(2) compliance on regulatory actions taken by the U.S. Environmental Protection Agency ("EPA") under FIFRA. The regulations enhance the efficiency and effectiveness of ESA consultation through two optional alternative processes that take greater advantage of EPA's information and expertise on the effects of pesticides on the environment. One alternative modifies the normal 50 C.F.R. § 402.13 process for informal consultation for FIFRA actions that EPA determines are "not likely to adversely affect" any ESA-listed threatened or endangered species or critical habitat. The other alternative enables the Service to conduct formal consultation (*see* 50 C.F.R. § 502.14) in a more efficient manner. *See* 69 Fed. Reg. 47732, 47735-36.

As the preamble explains:

> The single greatest opportunity in the consultation process is for the Services to take greater advantage of the extensive analysis produced by EPA in its ecological risk assessments of pesticides. Relying more heavily on the EPA's scientific work product, while at the same time assuring EPA's analysis meets the high scientific standards required by the ESA, will reduce the amount of work required by the Services in each consultation and therefore accelerate completion of consultations.

Id. at 47736.

BACKGROUND ON PROPOSED INTERVENOR

Organized in 1933, CLA is the nationwide not-for-profit trade organization representing the major manufacturers, formulators, and distributors of crop protection and pest control products. CLA is headquartered in Washington, D.C. Its member companies produce, sell, and

LEARY · FRANKE · DROPPERT PLLC
1500 Fourth Avenue, Suite 600
Seattle, WA 98101
t: 206.343.8835
f: 206.343.8895

distribute virtually all the crop protection, specialty, and biotechnology products used by American farmers, professional users, and consumers, including the vast majority of pesticides registered under FIFRA. During public rulemaking proceedings, CropLife submitted detailed comments to the U.S. Fish and Wildlife Service in support of the joint counterpart regulations.

CLA represents its members' interests by, *inter alia*, monitoring federal agency regulations and agency actions and related litigation to identify issues of concern to the crop protection and pest control industry, and participating in such litigation when appropriate. For example, in this Court CLA is currently an intervenor-defendant on ESA consultation issues arising under FIFRA in *Washington Toxics Coalition v. EPA*, No. C01-0132C (W.D. Wash.), *appeal pending*, No. 04-35138 (9th Cir.), which Plaintiffs have identified as related to the instant lawsuit. *See* Complaint ¶¶ 44-48. CLA is also participating as an intervenor or *amicus curiae* in three of the other pending actions seeking § 7 consultations on pesticide registrations identified in the Complaint: *Center for Biological Diversity v. Whitman*, No. C-02-1580 JSW (N.D. Cal.); *NRDC v. EPA*, No. RDB 03 CV 2444 (D. Md.); and *Center for Biological Diversity v. Leavitt*, No. 1:04-cv-00126-CKK (D.D.C.). *See* Complaint ¶ 49.

CLA's members have invested tens of millions of dollars in research and testing of their pesticides in order to provide assurance of their safety to the environment. CLA should be granted intervention as of right because its members are the principal stakeholders in establishing an efficient and effective procedure by which EPA can comply with ESA § 7 in conjunction with registering pesticides under FIFRA, without imposing additional burdensome and time-consuming procedural barriers to pesticide registration.

ARGUMENT

I. INTERVENTION OF RIGHT SHOULD BE GRANTED

CLA meets the four conditions for intervention of right under Rule 24(a)(2): (1) this motion is timely; (2) CLA has a "significantly protectable" interest relating to the property or transaction which is the subject of this lawsuit; (3) CLA is so situated that disposition of this suit

LEARY · FRANKE · DROPPERT PLLC
1500 Fourth Avenue, Suite 600
Seattle, WA 98101
t: 206.343.8835
f: 206.343.8895

may as a practical matter impair or impede its ability to protect that interest; and (4) that interest may not be adequately represented by the other parties to the suit. *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993).

A. This Motion To Intervene Is Timely

This motion is timely because this case is at a very early stage. The Complaint was filed on September 23, 2004, less than two months ago. Defendants have not yet filed their Answer, no dispositive motions have been filed, and the initial status conference has not yet been held. *See Sierra Club v. EPA*, 995 F.2d at 1481 (granting intervention where application made "before the EPA had even filed its answer"); 7C Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1916, at 435-39 (2d ed. 1986) (a motion to intervene "made before the existing parties have joined issue in the pleadings has been regarded as clearly timely"). Moreover, neither Plaintiffs nor Defendants will be prejudiced by the timing of this motion to intervene. CLA agrees to abide by any litigation schedule set by the Court or agreed to by the other parties.

B. CLA Has Legally Protectable Interests That May Be Impaired by Disposition of This Case

Rule 24(a)(2) is satisfied "when the applicant claims an interest relating to the property or transaction which is the subject of the action" and "disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." The interest test is interpreted flexibly and "broadly, in favor of the applicants for intervention." *Sierra Club v. EPA*, 995 F.2d at 1481. The interest test seeks to involve "as many apparently concerned persons as is compatible with efficiency and due process." *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980).

The "subject of this action" is a set of regulations designed to facilitate compliance with the ESA in the registration of pesticides under FIFRA. Pesticide registrations are government licenses. CLA's members are actual and prospective licensees with a self-evident interest in the

LEARY · FRANKE · DROPPERT PLLC
1500 Fourth Avenue, Suite 600
Seattle, WA 98101
t: 206.343.8835
f: 206.343.8895

license requirements. In an analogous case, a court expressly found that pesticide registrants have a qualifying interest in lawsuits brought to challenge EPA approval of their registrations:

> Plaintiffs' complaint challenges procedures pursuant to which EPA reached preliminary decisions that the intervenors' pesticide products merited continued registration. If plaintiffs succeed in this case, these regulatory decisions, which are obviously in the intervenors' interest, will be set aside. Thus, the intervenors can be said to have a substantial and direct interest in the subject of this litigation.

Natural Resources Defense Council v. EPA, 99 F.R.D. 607, 609 (D.D.C. 1983).

Like the registrants in that case, CLA here has a substantial and direct interest in the subject of this litigation that meets the Rule 24(a)(2) standard. CLA's members are businesses that depend on the FIFRA registration process to enable them to market pesticides and crop protection products. The joint counterpart regulations are designed to enhance ESA compliance for FIFRA actions is a way that "avoids unnecessary burdens on pesticide users with no sacrifice to the protection of listed species." 69 Fed. Reg. 47736. The generic consultation regulations issued by the Services in 1986 have proven to be a poor fit with the FIFRA registration process for a variety of reasons: the disparity between the broad scope of FIFRA registrations and the narrower geographical scope of most actions by other federal agencies that undergo standard ESA § 7 consultation; the sheer numbers of pesticide decisions made each year by EPA; and the burdensomeness and redundancy of requiring manufacturers, who have already submitted voluminous data showing that their products meet the FIFRA standard (no "unreasonable adverse effects on the environment," 7 U.S.C. § 136a(c)(5)), to demonstrate in addition that registering them will not violate the ESA "jeopardy" standard (16 U.S.C. § 1536(a)(2)). *See* 47735-36 (explaining "Reasons for a Counterpart Regulation for EPA Pesticide Actions"). The counterpart regulations fine-tune the ESA § 7 consultation process to capitalize on the significant body of scientific information that EPA will have developed under FIFRA to evaluate the hazards a pesticide may pose to non-target wildlife.

Thus, CLA's interest in the joint counterpart regulations is straightforward and substantial. These regulations provide alternatives to a process that has caused delays in registrations and

LEARY · FRANKE · DROPPERT PLLC
1500 Fourth Avenue, Suite 600
Seattle, WA 98101
t: 206.343.8835
f: 206.343.8895

spawned litigation leading in some cases to restrictions on pesticide use. If, as Plaintiffs request in this lawsuit, the counterpart regulations are invalidated, CLA's members will again be at the mercy of a set of generic regulations that were not designed with the idiosyncrasies of FIFRA in mind. Since CLA's members hold, or would in the normal course apply for, the EPA pesticide registrations that will be subject to the joint counterpart regulations, intervention clearly should be granted in this suit. *See Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972-73 (3d Cir. 1998) (timber industry's economic interests in present and future timber sales contracts with U.S. Forest Service were sufficient for intervention of right in a suit against the regulating agency seeking to restrict those timber sales).

CLA's members' business interests in manufacturing and selling their products are also sufficient for intervention of right.[2] Just as "[t]imber companies have direct and substantial interests in a lawsuit aimed at halting logging or, at a minimum, reducing the efficiency of their method of timbercutting," *Kleissler*, 157 F.3d at 972, so too pesticide manufacturers have discrete and substantial interests in this lawsuit, in which Plaintiffs seek to invalidate regulations that facilitate getting pesticide products to market as Congress intended. *See* Pub. L. No. 100-478 § 1010, 102 Stat. 2313, 7 U.S.C. § 136a (§ 1010 of the 1988 ESA amendments directing that ESA compliance for EPA's FIFRA program be designed "to minimize the impacts to persons engaged in agricultural food and fiber commodity production and other affected pesticide users and applicators").

[2] *See, e.g., Californians for Safe Dump Truck Transportation v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (employees with economic interest in higher wages granted intervention of right in a case that could limit wages); *Kleissler*, 157 F.3d at 973 (intervenors' interest in future U.S. Forest Service timber sales contracts, in furtherance of statutory timber production purpose of National Forests, is "substantial interest, directly related to and threatened by" lawsuit challenging timber sale projects, and "meets the requirements of Rule 24(a)"); *Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996) (farming interests granted intervention in a case that could adversely affect them); *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 & n.11 (9th Cir. 1995) (timber industry granted intervention of right in suit challenging timber harvesting); *Conservation Law Foundation of New England v. Mosbacher*, 966 F.2d 39, 43-44 (1st Cir. 1992) (fishing industry granted intervention of right in a case seeking greater regulation of fishing).

LEARY · FRANKE · DROPPERT PLLC
1500 Fourth Avenue, Suite 600
Seattle, WA 98101
t: 206.343.8835
f: 206.343.8895

Further, due process and simple fairness suggest that all those potentially affected by the joint counterpart regulations should be represented in this litigation – the Services, which issued and will implement the regulations; the Plaintiffs, who challenge them; and the affected private sector stakeholders, who would ultimately bear the brunt of an order in Plaintiffs' favor. *See Kleissler*, 157 F.3d at 971 (in cases pitting private, state, and federal interests against each other, "[r]igid rules [barring intervention] contravene a major premise of intervention – the protection of third parties affected by the pending litigation. Evenhandedness is of paramount importance."). CLA would structure its briefs to focus on the relevant ESA, APA, FIFRA, and NEPA issues, along with potential jurisdictional issues concerning this facial challenge to a set of optional ESA consultation procedures.

C. CLA's Interests May Not Be Adequately Represented by Existing Parties

The final criterion for intervention of right is whether the representation of CLA's interests by existing parties "may be" inadequate. The "burden of that showing should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538-39 n.10 (1972); *accord Sierra Club v. Espy*, 18 F.3d at 1207; *Scotts Valley Band of Pomo Indians v. United States*, 921 F.2d 924, 926 (9th Cir. 1990). CLA clearly is not adequately represented by Plaintiffs – they seek to invalidate the regulations that CLA supports and is intervening to defend. *See United States v. Stringfellow*, 783 F.2d 821, 828 (9th Cir. 1986) (adverse party cannot adequately represent applicant's interests).

There is some commonality of interests between the Federal Defendants and CLA. But such an overlap between private industry and the government "does not necessarily ensure agreement in all particular respects about what the law requires." *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (allowing industry to intervene in environmental organization's suit against EPA). The Federal Defendants "may not" adequately represent CLA's interests for several reasons:

LEARY · FRANKE · DROPPERT PLLC
1500 Fourth Avenue, Suite 600
Seattle, WA 98101
t: 206.343.8835
f: 206.343.8895

First, CLA has a stronger interest than do its members' federal regulators in protecting the economic and other interests of manufacturers, formulators, and distributors of crop protection and pest control products. While the government agencies must represent the broad public interest, CLA's members are legitimately concerned with the economic well-being of their businesses. *See Trbovich*, 404 U.S. at 538-39; *Sierra Club v. Espy*, 18 F.3d at 1208.

Second, the Federal Defendants have an institutional, but not an economic, stake in opposing invalidation of the joint counterpart regulations. Should settlement negotiations commence, the Federal Defendants and CLA could well have different perspectives on any settlement. The Federal Defendants cannot adequately represent their "public interest" in implementing the ESA in the context of pesticide registration and CLA's interests against unjustified restrictions on product registration. *See Trbovich*, 404 U.S. at 539. *See also Kleissler*, 157 F.3d at 973-74 ("[t]he straightforward business interests asserted by intervenors may become lost in the thicket of sometimes inconsistent governmental policies").

Third, the Federal Defendants may well take different positions from CLA on jurisdictional, merits, and remedy issues. Differences between government agency defendants and private industry intervenors on such issues were instrumental in obtaining Supreme Court reversal of an aberrant Sixth Circuit decision in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998). In that case, the federal government *opposed* Supreme Court review of the unfavorable decision below, and it fell to the industry intervenors to petition for certiorari, which was granted despite the government's opposition. As that case illustrates, an affected industry's positions may differ from a government agency's, and the inclusion of the industry can lead to a more complete development of the issues.

Lastly, CLA will add a necessary element to the proceedings. Granting intervention will ensure that all affected interests (the environmentalists, the Federal agencies, and the economically affected entities) are heard. This will promote fairness and a more informed decision by the Court.

LEARY · FRANKE · DROPPERT PLLC
1500 Fourth Avenue, Suite 600
Seattle, WA 98101
t: 206.343.8835
f: 206.343.8895

II. PERMISSIVE INTERVENTION SHOULD BE GRANTED

If the Court denies intervention of right, it should grant permissive intervention under Rule 24(b)(2). An applicant seeking to intervene under Rule 24(b)(2) must show that: (1) its application is timely; and (2) its claim or defense and the main action have a question of law or fact in common. The Ninth Circuit recently explained that:

> Unlike Rule 24(a), a "significant protectable interest" is not required by Rule 24(b) for intervention; all that is necessary for permissive intervention is that intervenor's "claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). Rule 24(b) "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459, 60 S. Ct. 1044, 84 L. Ed. 1293 (1940).

Kootenai Tribe of Idaho v. Veneman, 313 F.3d at 1108.

In *Kootenai*, the Ninth Circuit held that private environmental groups lacked the significant protectable interest necessary to intervene as of right in a suit under NEPA in defense of a U.S. Forest Service rule. The court did, however, affirm a grant of permissive intervention because those same groups satisfied the terms of Rule 24(b)(2). *Id.* at 1110-11. The Ninth Circuit agreed with the district court that permissive intervention was appropriate because "the magnitude of this case is such that both Applicants' intervention will contribute to the equitable resolution of the case." *Id.* at 1111.

Kootenai supports permissive intervention in this case. To begin with, CLA has satisfied the plain language of Rule 24(b)(2). As shown above, this application is timely since it has been filed before Defendants have filed their Answer and before the initial case management conference has occurred. At this early stage of the litigation, intervention will not delay the proceedings, nor will CLA's participation unfairly prejudice any party's interest in a fair adjudication. Indeed, the prospect of a fair and full adjudication is enhanced by the participation of third parties whose Federal licenses depend upon the process established in the challenged regulations. Moreover, if CLA is allowed to participate as an Intervenor-Defendant, its defenses will respond to the issues urged by Plaintiffs. Thus, there is a complete commonality between

LEARY · FRANKE · DROPPERT PLLC
1500 Fourth Avenue, Suite 600
Seattle, WA 98101
t: 206.343.8835
f: 206.343.8895

Plaintiffs' claims and CLA's defenses. CLA would structure its participation to foster a more-informed decision by this Court.

Equally important to the Court's exercise of discretion, this case, like *Kootenai*, has far-reaching implications, and CLA's participation will "contribute to the equitable resolution" of the case. The joint counterpart regulations establish an alternative procedural framework for complying with ESA § 7 whenever a company seeks to register or re-register a pesticide under FIFRA. If Plaintiffs prevail, a process providing for efficient and effective compliance with ESA § 7 in conjunction with pesticide registrations will be nullified. It is in the interests of justice and the "equitable resolution" of this case to allow all affected interests to participate in the case. *See Kootenai*, 313 F.3d at 1111. Therefore, permissive intervention should be granted.

CONCLUSION

For the foregoing reasons, CLA's motion to intervene as a party defendant should be granted.

DATED this 18th day of November, 2004.

Respectfully submitted,

CROWELL & MORING LLP

Steven P. Quarles (D.C. Bar No. 351668)
J. Michael Klise (D.C. Bar No. 412420) (*pro hac vice* application pending)
Thomas R. Lundquist (D.C. Bar No. 968123)
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 624-2500

LEARY FRANKE DROPPERT PLLC

s/ J.J. Leary, Jr.
J.J. Leary, Jr. (WSBA No. 08776)
1500 Fourth Avenue, Suite 600
Seattle, WA 98101
(206) 343-8835

Attorneys for Applicant for Intervention
CropLife America

LEARY · FRANKE · DROPPERT PLLC
1500 Fourth Avenue, Suite 600
Seattle, WA 98101
t: 206.343.8835
f: 206.343.8895